



## MODULE 4, LESSON 1

### LEGAL OBLIGATIONS TO PROTECT THE MARINE ENVIRONMENT AND THE PRECAUTIONARY APPROACH

#### LECTURE NOTES

##### 0. Introduction

My name is Atsuko Kanehara, Professor of public international law at Sophia University in Tokyo, Japan. It is really a great honour for me to deliver a lecture on this occasion. I would like to express my sincere gratitude to professor Shirayama and the Organizers of this Deep Dive Project for giving me such an honourable opportunity.

My lecture aims at giving you a general survey of international law on the marine environmental protection. In doing so, as much as possible, I will mention especially the natural resources development activities in the deep seabed. As international law, I will focus on the United Nations Convention on the Law of the Sea, UNCLOS.

Then, let's move onto a general survey of international law on the marine environmental protection.

##### 1. Fundamental Principle of the Marine Environmental Protection under UNCLOS: The 1972 Stockholm Declaration on Human Environment and the 1992 Rio Declaration on Environment and Development

Principle 21 of the 1972 Stockholm Declaration on Human Environment is the most fundamental principle of the international environmental protection. It is also echoed in Principle 2 of the 1992 Rio Declaration on Environment and Development. The fundamental principle is frequently reproduced in many international treaties on the international environmental protection. This is certainly also the case with UNCLOS.

After prescribing a general obligation to protect and preserve the marine environment under Article 192 in the Part XII, Article 194, Paragraph 2 almost reproduces the fundamental principle.

The gist of Article 194, Paragraph 2 reads:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment,...

Article 194, Paragraph 3 of UNCLOS makes clear that it encompasses all sources of pollution. They are, vessel source pollution, land-based pollution, pollution from sea-bed activities subject to national jurisdiction, pollution from activities in the deep sea-bed, pollution by dumping, and pollution from or through atmosphere. UNCLOS puts in order all sources of pollution in its Part XII.

We will focus later upon the pollution from activities in deep sea-bed.

Here, I will solely introduce Article 194, Paragraph 3 (c). This provision particularly refers to the natural resources development activities in the deep sea-bed.

The provision reads:

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimize to the fullest possible extent:

(c) pollution from installations and devices used in exploration or exploitation of the natural

resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

Thus far, we have confirmed the obligation to protect and preserve the marine environment under UNCLOS. Then, how do the party States to UNCLOS comply with the obligations under UNCLOS?

Here, I will focus upon domestic implementation of the obligations by the party States.

## **2. Creation and Implementation of International Law by Sovereign States**

### **(1) Unique Implementation Mechanism under UNCLOS, Part XII**

In Part XII, UNCLOS establishes its unique implementation mechanism by distributing legislative, enforcement and judicial jurisdictions to coastal States, port States, and flag States depending on the sources of pollution. The term “jurisdiction” means States’ competence, and there are three kinds of it: legislative jurisdiction; enforcement jurisdiction; and judicial jurisdiction. In some cases, the latter two jurisdictions are called enforcement jurisdiction or imperative jurisdiction.

The party States domestically implement the obligations under UNCLOS by exercising their jurisdiction.

### **(2) Fundamental Structure of the International Society by the Co-Existence of Sovereign States**

In order to enable you to easily understand the implementation mechanism of the obligations under UNCLOS, I would like to emphasize the fundamental structure of the international society.

It consists of the co-existence of sovereign States. Even with the development of international organizations, such as the United Nations, the International Seabed Authority, and the International Tribunal for the Law of the Sea, this fundamental fact of the co-existence of sovereign States has

not been changed.

In such co-existence, sovereign States are equal to, and independent from, each other. Therefore, the international society does not have any authoritative legislative, enforcement and judicial organs. "Authoritative" means "above sovereign States." In place of such authoritative organs, sovereign States themselves discharge both the roles of creating, and implementing international law.

Regarding creation of international law, as I already explained, by UNCLOS, which is an agreement of sovereign States, precisely speaking, the party States to UNCLOS, they set forth the international rules on the marine environmental protection.

As I made clear, in this lecture, I am focusing upon domestic implementation of international law. Different from this, there are some mechanisms of international implementation of international law. For instance, under human rights conventions, there is a report and review system, namely a mechanism for the designated committee under the convention to receive reports from their party States and to review them. Regarding judicial function, international courts, such as the International Court of Justice and the International Tribunal for the Law of the Sea can have their competence strictly based upon agreements of sovereign States. These courts do not hold any imperative judicial jurisdiction.

I am not going into the detail of international implementation of international obligation, since I am focusing upon domestic implementation of international obligations.

As to the domestic implementation of the international rules, they are implemented by sovereign States. For that purpose, sovereign States exercise three kinds of jurisdiction, namely, legislative, enforcement and judicial jurisdiction.

### **(3) Domestic Implementation of the Rules under UNCLOS for Avoiding Environmental Harms from the Natural Resources Development Activities by States' Exercise of Their Jurisdiction**

Let's take an example of the natural resources development activities in the deep sea-bed by a private company X which holds a nationality of State A.

States should exercise its jurisdiction in accordance with the relevant provisions of UNCLOS, Article 209 and Article 215.

Regarding the legislative jurisdiction, Article 209, Paragraph 2 reads:

- (1. International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.)
2. Subject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.

Regarding the enforcement jurisdiction, Article 215 reads:

Enforcement of international rules, regulations and procedures established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.

### **(4) Sponsoring States and Contractors in the Advisory Opinion Rendered by the Seabed Dispute Chamber of the International Tribunal of the Law of the Sea (ITLOS), 1 February, 2001**

In the Module I of the Deep Dive, Lecture 7 may deal with the Advisory Opinion rendered by the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS).

I will not repeat the Advisory Opinion in detail. Just for your convenience, I will explain the domestic implementation of the provisions of UNCLOS by party States with referring to the Advisory Opinion,

as much as possible.

According to the Advisory Opinion, State A of my lecture is a Sponsoring State, and the Company X is a Contractor of its Sponsoring State A.

The International Seabed Authority issued Regulations concerning prospection and exploration of natural resources in the deep sea-bed.

A sponsoring State, State A, as its exercise of legislative jurisdiction, enacts domestic rules in accordance with Article 209 of UNCLOS and these regulations. Legislative jurisdiction is State A's competence to enact laws to regulate the natural resources development activities of the Contractor, the company X in the deep sea-bed. The company X should obey the domestic rules.

As enforcement jurisdiction, Sponsoring State A may take administrative measures to compel the Contractor company X to comply with the domestic rules. Further, if the Contractor company X does not obey the rules, a domestic court of Sponsoring State A may render a judgement, for instance, to punish the Contractor company X and to impose fine on it. This is Sponsoring State A's exercise of judicial jurisdiction.

This is a simple sketch of an exercise of three kinds of jurisdiction by a State to domestically implement the international rules under UNCLOS to avoid environmental harms from the natural resources development activities in the deep sea-bed.

### **3. Prevention and Precaution of Harms to the Marine Environment**

#### **(1) The Title of This Lecture: "Precautionary Approach"**

Regarding the international rules on the marine environmental protection, I would like to explain the concepts of "prevention" and "precaution" of harms to the marine environment. The title of my lecture, which was given by the Organizer of this Deep Dive Project, reads "precautionary

approach.”

## **(2) Development of the Concept of “Prevention” of Environmental Harms**

Traditionally, first, the principle of prevention of environmental harms was established under international law. “Prevention” means to take measures in order to avoid environmental damages, when with scientific evidence and predictability, some planned activities would cause environmental harms. Without taking the preventive measures, States should refrain from conducting such activities. In the “prevention” of the environmental harms, scientific evidence and predictability regarding those harms are really the core requirements for triggering the obligation of prevention. In other words, when there are not scientific evidence and predictability for the environmental harms, States need not to take the preventive measures.

## **(3) Newly Emerged Concept of “Precaution”**

In contrast to prevention, “precaution” means taking measures to avoid environmental harms, even when there is scientific uncertainty, and, therefore, unpredictability, regarding such environmental harms. In other words, States that have a plan to conduct some activities are required to take precautionary measures to avoid the environmental harms, even without scientific certainty and predictability for the environmental harms.

Thus, the duty of precaution of environmental harms is said to be stricter than the duty of prevention of environmental harms. In other words, economic activities, such as the natural resources development activities in the deep sea-bed are restricted in a more severe manner by the duty of precaution than by the duty of prevention.

Mainly in the field of the international environmental law, the idea of precaution of environmental

harm has been developed and established. The 1992 Rio Declaration on Environment and Development, sets forth the precautionary approach under Principle 15.

Principle 15 reads:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

#### **(4) Difference between Prevention and Precaution**

Then, when and at what timing, should States take precautionary measures, even without scientific certainty and predictability for environmental harms? What is the precise difference between “prevention” and “precaution?”

They are very difficult questions to answer. In place of answering them, I can give you the three following suggestions.

First, precautionary measures tend to be required particularly when irreversible and so serious environmental harms are prospected.

Second, to ensure precaution, the concrete obligations have been established for taking measures prior to planned activities. Among them, the duty to conduct an environmental impact assessment is outstanding. UNCLOS itself under Article 206 provides for an environmental impact assessment.

Third, under the duty of precaution, planning States of the activities would have more burden than under the duty of prevention, to prove that there would be no harms to environment by the activities.

When precaution is required, with respect to their planned activities, States and contractors should, at least, bear in mind these three points.

This is the end of my lecture. Thank you for your kind attention.

Please check your understanding of my lecture by trying the quiz.